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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. 954

BOARD OF PUBLIC INSTRUCTION OF DUVAL COUNTY, FLORIDA, ET AL.,
Petitioners,

versus

DALTON BRAXTON and SHARON BRAXTON, Minors, by Sadie Braxton, their mother and next friend, ET AL.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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CITATIONS

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Supreme Court of the United States

OCTOBER TERM, 1963

BOARD OF PUBLIC INSTRUCTION OF DUVAL COUNTY, FLORIDA, ET AL,
Petitioners,

versus

DALY N. BRAXTON and SHARON BRAXTON, Minors, by Sadie Braxton, their mother and next friend, ET AL,
Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on January 10, 1964.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court (R. 283-298), printed in Appendix B hereto, *infra*, page 30, is unreported. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, page 12, is unreported to date.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 10, 1964. R. 380; page 27, *infra*. Rehear-

ing was denied on February 20, 1964. R. 425; page 29, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254 (1).

QUESTIONS PRESENTED

1. Was the order of the District Court which was appealed from an appealable order under 28 U.S.C.A. § 1291 or 28 U.S.C.A. § 1292(a)(1)?[1]

2. Did the decisions in the cases of *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483, 349 U.S. 294, compel the entry of an injunction by the District Court prohibiting the assignment of teachers and other school personnel in a public school system on a racial basis, without a showing of injury to the plaintiffs, who were minor Negro pupils in that school system?

STATUTE INVOLVED

The statutory provisions involved are 28 U.S.C.A. § 1291 and 28 U.S.C.A. § 1292(a)(1). They are printed in Appendix A, *infra*, page 11.

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[1]The provision of that order (para. 3 F) which enjoined the application of the criteria of the Florida Pupil Assignment Law, or any other criteria for admission, assignment or re-assignment, to schools other than uniformly and without racial discrimination **was made effective immediately.** All other injunctive provisions, including the prohibition against assigning teachers, principals and other supervising personnel on a racial basis **specifically was not made effective until further order of the Court.** (R. 296,297) This Appeal was from the latter injunctive provisions.

STATEMENT

The respondents, minor Negro children and pupils in the Duval County, Florida, public school system, by their parents brought a suit asking for a permanent injunction against the operation of an alleged compulsory biracial school system in Duval County, or, in the alternative, for a decree directing petitioners to present a complete plan of desegregation.

Although the respondents alleged in their complaint that they and members of their class were injured by the policy of assigning teachers, principals and other school personnel on the basis of race and color of the children attending a particular school and the race and color of the person so assigned, *they presented no evidence at the trial in support of those allegations.*

The District Court nowhere made a finding of fact that respondents had been injured by the alleged policy of assigning teachers or supervisory personnel on a racial basis. It nevertheless held that Negro pupils possessed the right under the Fourteenth Amendment to have the entire school system operated on a nonracial basis, including the assignment of teachers, principals and supervisory and supporting personnel on a nonracial basis. *The rational of the District Court's decision is unmistakable. Its decree is based upon the following simply stated conclusion:* "No less than this is *required* by the *Brown* case, as interpreted by *Cooper v. Aaron*, 358 U.S. 1 at p. 7" (R. 290).

The District Court having reached that conclusion, required the defendants to submit to the Court on or before

October 30, 1962 a complete plan of desegregation,[2] which would provide among other things, for the elimination, system wide, of discriminatory assignments of teachers, principals, supervisory and supporting personnel, as well as the elimination of discrimination racially in the construction, designation, budgeting of funds, maintenance and operation of all schools in the system (R. 294,298). *The Court's decree, however, deferred putting into effect all action paragraphs of the injunction decree save one and deferred the effective date of these last two aspects of the plan until the further order of the Court,* (Para. 4(b) R. 297)

Petitioners, on November 1, 1962, appealed only from that portion of the injunctive decree which related to the assignment of teachers, principals and other professional school personnel to the schools of Duval County and to the provision relating to budgets, employment and construction contracts and policies and curricula. They requested that those portions of the Distict Judge's decree be reversed.

The Court of Appeals, Fifth Circuit, affirmed the District Court on January 10, 1964 by a two-to-one decision and denied a petition for rehearing on February 20, 1964 by a like decision. Before doing so, it stated that it was faced *in limine* with the question of whether it had before it an appealable order. The majority held that it did (Appendix B, pp. 12-19). The minority felt otherwise, that the case of *Taylor v. Board of Education*, 2d Cir. 1961, 288 F.2d 600,

[2]Petitioners filed a plan, pursuant to the Court's order, on October 30, 1962, complying with paragraph 9 of the Conclusions of Law, but deferring "the elimination system wide of any discriminatory assignments of teachers, principals and supervisory personnel and the elimination of discrimination racially in the construction of schools, the designation and budgeting of funds, maintenance and operation of all schools in the system" as permitted by the Court's order (R. 294,297). This plan was approved by the Court and not appealed from.

cert. den. 368 U.S. 940, 82 S.Ct. 382, 7 L.ed. 2d 339 was not only well considered but was not to be distinguished from this case.

Having decided that the District Court's order was appealable, the Court below erroneously affirmed that Court's decision that the decisions in the *Brown* cases had construed the Fourteenth Amendment *to require* petitioners to reorganize their school system into a single nonracial system, including the assignment of teachers, principals and supervising and supporting personnel on a nonracial basis.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below is directly in conflict with the decision of the Court of Appeals, Second Circuit, in *Taylor v. Board of Education*, 2d Cir. 1961, 288 F.2d 600, cert. den. 368 U.S. 940, 82 S.Ct. 382, 7 L.ed.2d 399 (Appendix C, *infra*, pp. 46-60). There the Second Circuit decided on appeal that the order of the District Judge was not an appealable order under 28 U.S.C.A. 1292(a)(1) or 28 U.S.C.A. § 1291. In that case the District Judge had stated that

> "... he deemed it 'unnecessary at this time to determine the extent to which each of the items of the relief requested by plaintiffs will be afforded', (191 F. Supp. 198) but would defer such determination until the Board had presented, on or before April 14, 1961, 'a plan for desegregation in accordance with this Opinion, said desegregation to begin no later than the start of the 1961-62 school year'." 288 F.2d 601.

In the present case the District Judge in para. 4(b) of his decree (R. 297) provided that all provisions of the per-

manent injunction except one (para. 3 F) *were not to be effective until further order of the Court.* The dissenting judge below well said, "It would seem to be no injunction at all where the Court directed something to be done and then provided that it need not be done unless required by a further order." (R. 391)

2. The decision of the Court below in the instant case is directly in conflict with the decision of the Court of Appeals, Sixth Circuit, in *Mapp v. Board of Education of the City of Chattanooga, Tennessee*, 319 F.2d 571 (Appendix C, *infra*, pp. 61-73). In that case the Sixth Circuit held that neither by the first *Brown* decision, nor by its later decisions, had this Court ruled upon the question of law that the assignment of teaching personnel on a racial basis impaired the *student's rights* to an education free from any consideration of race.

The Fifth Circuit by affirming the decision of the District Court held to the contrary, namely, that the decisions of this Court in the *Brown* cases *compelled* a decision that the assignment of teaching personnel on a racial basis offended a constitutional right of school children (R. 289,290) without any showing by any proof that such assignments had a detrimental effect on the Negro children plaintiffs, for such was the decision of the District Court.

The majority avoided that issue by incorrectly stating the question before it in considering the merits of the controversy. It said that

> "... that question is whether the decision of the United States Supreme Court in *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483, and the subsequent appearance of the same case, 349 U.S. 294, or other au-

thoritative decisions of that or this court, *AUTHORIZE* an order by a trial court . . . . to include in its order . . . a prohibition against the assignment of teacher and other personnel on a racial basis and to prohibit the financing and physical arrangement of schools on a racial basis." (Emphasis added)

That was not the question before it. That is not what the Distict Court had decided. It said, as has been pointed out above: "No less than this is *required* by the *Brown* case as interpreted by *Cooper v. Aaron*, 358 U.S. 1 at p. 7." (R. 290) (Emphasis added)

Petitioners concede, as they did in the Court below, that the decisions of this Court (the *Brown* cases included) *authorize* an order by a District Court enjoining the assignment of teachers upon a different basis than that now in effect *where the Court finds as a fact that plaintiffs have suffered injury from the existing system*. That is the rational of the dissenting opinion below. The dissenting justice there said:

". . . . It should be kept in mind, however, that the principles of law declared in *Brown* were dependent upon the actual finding of injury to pupils. . . . There was no proof made of the injury and no finding by the court that the policy of assigning Negro personnel to Negro schools and white personnel to white schools has a detrimental effect upon Negro children. No such finding of fact has been made in any other case, so far as I am aware."

3. The Court below misconstrued and misapplied the opinions of this Court in *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483, 349 U.S. 294. Those cases did not decide that Negro children had a constitutional right to the assignment of school personnel on a nonracial basis.

without any showing of injury or detriment to Negro children. A reading of the opinion in the *Brown* cases shows they dealt solely with pupil segregation and their admission to schools on a nonracial basis.

This Court itself stated the question present in the first *Brown* case as: "Does the segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal education opportunities . . . ."[3] Before it there adjudicated the constitutional rights of the Negro school children, *it made a determination of injury or detriment to Negro pupils* resulting from a policy of segregation of white and Negro school children. The record before the Court contained specific evidence and findings of such an injury,[4] and this Court found, *as a fact*, that "segregation of white and Negro children has a detrimental effect upon colored children."

This Court then concluded that the plaintiff Negro children were, by reason of the segregation complained of, deprived of the equal protection of laws guaranteed by the Fourteenth Amendment.[5] It is clear that the sole legal issue dealt with was the segregation of Negro and white children in public schools. The only rights adjudicated were the rights of the Negro children to be admitted to public schools on a non-segregated basis.

In the second *Brown* opinion, 349 U.S. 294, this Court considered the question of appropriate relief to carry out the decision made in the first *Brown* opinion. The Court itself stated clearly and positively that the *objective* of the relief

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[3]347 U.S. at p. 493.
[4]347 U.S. at p. 494, fnote 10 and 11 at p. 494
[5]347 U.S. at p. 495

granted was to *admit* Negro children to public schools as soon as possible on a non-discriminatory basis. This clearly shows, as Judge Jones pointed out in his dissenting opinion below, that the scope of remedies prescribed by the Supreme Court in those cases related solely to achieving a system of *admitting students* to public schools on a nonracial basis.

It thus is submitted that *the Brown cases dealt solely with pupil segregation, not with the assignment of school personnel or any rights of Negro pupils in connection therewith*, and the Cout below misconstrued and misapplied the decisions of this Court in those cases in affirming the decision of the District Court in this case.

4. Clearly the questions presented are of great importance.

Settlement of the question relating to the assignment of teaching and other school personnel is unquestionably in the public interest. It is likely to be presented in almost every segregation case and every plan of desegregation filed. Until it is determined, school boards and trustees and school administrators will have no clear-cut guidelines to go by in adjusting the various school systems in the country to conform to the decisions of this Court and the injunctive decrees of the various District Courts.

The question of whether the injunctive decree of the District Court is appealable also is of great importance and will have an important effect upon the procedural law of the federal courts and the judicial code. The settlement of this question certainly is in the public interest and will give future litigants the proper rule upon which to take an appeal when the Court directs something to be done by injunction and then provides in the same order that it need not be done unless required by a further order of the Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

DATED March, 1964

Respectfully submitted,

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CERTIFICATE

I do certify that a copy hereof has been furnished to Earl M. Johnson, 625 West Union Street, Jacksonville, Florida and Constance Baker Motley, 10 Columbus Circle, New York 19, N. Y., attorneys for respondents, by mail this 24th day of March, 1964.

Attorney

STATUTES INVOLVED

APPENDIX A

1. Title 28, United States Code Annotated, Section 1291, reads as follows:

§ 1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. As amended October 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348.

2. Title 28, United States Code Annotated, Section 1292, reads as follows:

§ 1292. Interlocutory decisions.

(a) The courts of appeal shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20294

BOARD OF PUBLIC INSTRUCTION OF DUVAL COUNTY, FLORIDA, ET AL,
Appellants,

versus

DALY N. BRAXTON and SHARON BRAXTON, Minors, by Sadie Braxton, their mother and next friend, ET AL,
Appellees,

Appeal from the United States District Court for the Middle District of Florida.

(January 10, 1964.)

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and JOHNSON, District Judge.

TUTTLE, Chief Judge: This is an appeal by the Board of Education from an order of the trial court requiring a

start in the desegregation of the public school system of Duval County, Florida, of which the city of Jacksonville is the county seat. The basis of the appeal is that by including a prohibition against approving budgets, making available funds, and otherwise providing the physical facilities to "maintain or support a school system operated on a racially segregated basis" and by prohibiting "the assignment of teachers, principals, and other supervising or supporting personnel to schools on the basis of the race and color of the" said persons or the race and color of the pupils attending the respective schools, the trial court went too far. This, it is asserted, results both because there was a lack of a finding of facts warranting these two injunctive orders and also because there is nothing in the decided school desegregation cases that warrants such broad orders of injunction.

In point of fact, relatively little was required to be done by the Board of Education *immediately* by the trial court's injunctive order.[1] It outlined under paragraphs A, B, C, D, and E certain prohibited acts. Under paragraph F, it prohibited applying the criteria of the Florida Pupil Assign-

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1 After reciting the preliminary paragraphs the injunction contained the following provisions:

"A. Continuing to operate a compulsory biracial school system in Duval County, Florida;

"B. Continuing to maintain a duel scheme of pattern of attendance areas based on race or color;

"C. Assigning pupils to schools on the basis of race and color of the pupils;

"D. Approving budgets, making available funds, approving employment contracts and construction programs, and approving policies, curricula and programs designed to perpetuate, maintain or support a school system operated on a racially segregated basis;

"E. Assigning teachers, principals, and other supervising or supporting personnel to schools on the basis of the race and color of the persons to be assigned and or the race and color of the pupils attending the schools to which the personnel are assigned; and

ment Law other than uniformly and without racial discrimination. The order made only the requirement of paragraph F applicable immediately, but it then required that the defendants "on or before October 30, 1962, submit to the Court for its consideration a detailed and comprehensive plan for putting subparagraphs A, B, C, D and E of paragraph 3 above into effect throughout the Duval County Public school system."

Appellants, recognizing as they do, the binding authority of *Brown v. Board of Education of Topeka*, 347 U.S. 483, 349 U.S. 294, and the many decisions of this Court interpreting and giving effect to that landmark decision, do not contest that part of the trial court's order that is included in the first lettered paragaphs, A, B and C. Nor do they complain of paragraph F, which requires them to apply the criteria of the Florida Pupil Assignment Law non-racially. They do complain of being required to submit a plan which includes

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"F. Applying the criteria of the Florida Pupil Assignment Law, or any other criteria for admission, assignment or reassignment, to schools other than uniformly and without racial discrimination as to use or application thereof (see paragraphs 5, 6, 7 and 10 of the Conclusions of Law filed herewith for clarification).

"4. (a) The provisions of subparagraph F of paragraph 3 above are effective immediately and systemwide throughout the county.

"(b) The provisions of subparagraphs A, B, C, D and E of paragraph 3 above shall not be effective until the further order of this Court.

"(c) The defendants are directed, on or before October 30, 1962, to submit to the Court for its consideration a detailed and comprehensive plan for putting subparagraphs A, B, C, D and E of paragraph 3 above in o effect throughout the Duval County public school system.

"(d) Upon the filing of said and hearing plan thereoh, the Court will enter its supplemental decree herein accepting or rejecting the same in whole or in part and making such further disposition as right and justice may require."

the requirements under paragraph D and E. The principal attack is made on that provision which prohibits the assigning of teachers, principals and other supervising or supporting personnel schools on the basis of race.

We are faced *in limine* with the question whether we have before us an appealable order. While neither party raises the issue, since both apparently desire to have this Court's ruling on the question at issue, absence of an appealable order denies this Court of jurisdiction and must be noticed by the Court itself. It is plain that much of the order of the trial court is deferred in point of time. To this extent it may be said that the litigants may have an opportunity to prevail upon the Court prior to the actual effectuation of these parts of the order to request that they may be modified. To that extent they may be considered to be interlocutory orders. However, it was much the same kind of an order that came before this Court in *Orleans Parish School Board vs. Bush*, 5 Cir., 242 F. 2d 156.[2] Although the Orleans Parish order required immediate acceptance of the principle of non-segregated schools, it is obvious that the order allowed the Board time to put it into effect. Clearly implying that arrangements should be started at once, the trial court nevertheless fixed the date after which there were to be no further distinctions based on race at "such time as

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[2] The order in that case was as follows:

"It is Ordered, Adjudged and Decreed that the defendant, Orleans Parish School Board, a corporation and its agents, its servants, its employees, their successors in office, and those in concert with them who shall receive notice of this order, be and they are hereby restrained and enjoined from requiring and permitting segregation of the races in any school under their supervision, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially nondiscriminatory basis with all deliberate speed as required by the decision of the Supreme Court in Brown v. Board of Education of Topeka [347 U.S. 483, 74 S. Ct. 686, 98 L.Ed. 873], supra."

may be necessary to make arrangements for admission of children to such schools on a racially nondiscriminatory basis with all deliberate speed as required by the decision of the Supreme Court in Brown v. Board of Education." Nevertheless, in that appeal and also in a subsequent one in which the validity of the order was attacked by reason of the failure of the successful plaintiffs to post the bond required in the original order, this Court has not considered the order one that is not appealable by reason of not being an injunctive order. Of course, neither the order in the *Bush* case nor the one before us here is a final order in the sense that nothing further is left to be done by the trial court. It is appealable, therefore, if at all, only under the provisions of 28 U.S.C.A. §1292(a) (1). That section gives Courts of Appeal jurisdiction over "Interlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions . . ." It thus becomes necessary for us to determine whether the order of the trial court is one which "grants an injunction."

In light of our treatment of the order in the *Bush* case, it seems that there would be little question but that the order here appealed from falls within the language of 28 U.S.C.A. §1292(a) (1), were it not for a well considered case decided by the Court of Appeals for the Second Circuit, *Taylor v. Board of Education, etc.*, 2 Cir. 288 F. 2d 600. In that case, involving an order relating to the school system for the City of New Rochelle, New York,[3] that court, one

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[3] The decree of the trial court there before the Court of Appeals was as follows:

"In determining the manner in which the Negro children residing within the Lincoln district are to be afforded the opportunities guaranteed by the Constitution, I will follow the pro-

judge dissenting, raised the issue of appealability on its own motion and decided that Judge Kaufman's order in the trial court ordering the submission of a plan did not amount to mandatory injunction.

Of course, it should be made plain here that paragraph F of the order before us did require immediate application of the Florida Pupil Assignment Law. If the appellant, Board, had appealed from the effect of this part, thus there would be no doubt about the appealability. It has not, however, appealed from this provision of the order, thus leaving as the basis for its appeal only subparagraph (c) of paragraph 4, which requires them "on or before October 30, 1962, to submit to the court for its consideration a detailed and comprehensive plan for putting subparagraphs A, B, C, D and E of paragraphs 3 above into effect throughout the Duval County public school system."

The clear difference between the order before us and that in the *New Rochelle* case is that the trial court did expressly include in its order the following language in paragraph 3:

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cedure authorized by the Supreme Court in Brown v. Board of Education, 349 U.S. 294 [75 S.Ct. 753, 99 L.Ed. 1083] (1955), and utilized by many district courts in implementing the Brown principles. Thus I deem it unnecessary at this time to determine the extent to which each of the items of relief requested by plaintiffs will be afforded. Instead, the Board is hereby ordered to present to this Court, on or before April 14, 1961, a plan for desegregation in accordance with this Opinion, said desegregation to begin no later than the start of the 1961-62 school year. This court will retain jurisdiction of this action until such plan has been presented, approved by the court, and then implemented.

"The foregoing Opinion will constitute the court's findings of fact and conclusions of law."

> "The defendants, The Board of Public Instruction of Duval County, Florida . . . are, with respect to the public school system of Duval County, Florida, enjoined and restrained permanently from allowing, permitting or committing all, or any of the following:"

Then follow the lettered paragraphs which are quoted in Footnote 1 above. Then, although the trial court provided that the provisions of subparagraphs A, B, C, D and E "shall not be effective until the further order of this Court" it then said, "The defendants are directed, on or before October 30, 1962, to submit to the Court for its consideration, a detailed and comprehensive plan for putting subparagraphs A, B, C, D and E of paragraph 3 above into effect throughout the Duval County public school system." Thus it is that having enjoined the doings of the acts mentioned in the lettered paragraphs and having deferred the date on which the injunction should go into effect, the Court positively and affirmatively directed that a plan be submitted that *would provide for carrying out the paragraphs that were to be later effectuated.* We conclude that the ordering of the plan dealing expressly with these prohibited acts amounts to a mandatory injunction. To the extent that this may differ with the understanding of what constitutes an injunction as expressed by the Court of Appeals for the Second Circuit, we must respectfully disagree with its views. We think, however, that there is no real conflict because as that Court said, "Whether Judge Kaufman's direction for the submission of a plan on April 14 is a mandatory injunction requires, in the first instance, interpretation of what was said." What was said here was quite different from the limited statement made by Judge Kaufman in his decree.

Having concluded that this is an appealable order, we come next to the merits of the controversy. Stated in general terms, that question is whether the decision of the United States Supreme Court in *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483, and the subsequent appearance of the same case, 349 U.S. 294, or other authoritative decisions of that or this court, authorize an order by a trial court, once it has found the existence of a dual system of schools operated on a racially segregated basis, to include in its order seeking to remedy such a situation a prohibition against the assignment of teachers and other personnel on a racial basis and to prohibit the financing and physical arrangement of schools on a racial basis. We think the answer to this question is clear. The Supreme Court's solution of the question of the manner "in which relief is to be accorded" under its original decision in that connection was expressed as follows:

> "While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to *administration, arising from the physical condition of the school plant, the school transportation system, personnel,* revision of school districts and attendance areas

into compact units to achieve a system of determining admission to the public schools on a nonracial basis." (Emphasis added).

The argument of appellants here is largely to the effect that no court heretofore has expressly required the elimination of teacher assignment by race or the planning of schools and finances to avoid racial operation of the schools. This argument, of course, falls far wide of the mark. Neither has any appellate court had occasion to hold that for a trial court to go so far would be unwarranted under the Supreme Court's decision. In *Augustus v. Board of Public Instruction of Escambia County, Florida*, 5 Cir., 306 F.2d 862, this Court set aside an order of the trial court dismissing allegations in the complaint filed on behalf of Negro school children seeking to put an end to the assignment of teachers and other personnel by race. We thus held that it is a matter of proper concern in such a suit as the one now before us that teachers are so assigned. So too, in *Calhoun, et al. v. A. C. Latimer, et al.*, 5 Cir. 321 F.2d 302, this Court held that the trial court did not err in postponing consideration of the teacher assignment question.

Where, however, the trial court, which has the first duty with respect to requiring action if none is taken initially by the Board of Education, considers that in order fully to implement the Supreme Court's decision it will be necessary to put an end to the assignment of teachers and other personnel by race to the schools within the Board's jurisdiction we think it can not conceivably be said that such an order goes beyond the permissible range of the trial court's choice of means to put an end to an operation of schools on a racially segregated basis. The same, of course, is true with

respect to the requirement that the plan called for by the injunctive order make provision for putting into effect an end of approving budgets, making funds available, approving employment contracts and construction programs, and approving policies, curricula and programs and designed to perpetuate, maintain or support a school system operated on a racially segregated basis—the challenged provisions of paragraph D of the Court's order.

We conclude that the basic findings made by the trial court, which are not here in dispute, that "up to the present time, said biracial school system has been and is presently continued, perpetuated and maintained by the defendants as a matter of policy, custom and usage," and that "now as in the past, Negro personnel are assigned to Negro schools and white personnel are assigned to white schools," and the further finding that "in the eight (8) years since the first *Brown* decision the defendants have not adopted any plan whatever for eliminating racial discrimination in the public school system committed to them for administration," fully warrant the Court's conclusion: "In the instant case (and in similar cases) this Court is required by clear and binding precedent to frame a broad decree, granting to the plaintiffs in substance the injunctive relief sought by the complaint." The contested provisions of the decree fall well within the permitted range of relief that can properly be granted as a part of such decree.

The judgment is AFFIRMED.

JONES, Circuit Judge, dissenting:

I find myself out of harmony with the majority, both on the jurisdictional question and on the merits. I do not think the order from which the appeal is taken is such a final decision as is within the terms of 28 U.S.C.A. § 1291. A decision is final for the purpose of an appeal when it terminates the litigation and leaves nothing to be done but to enforce what has been determined. Ex parte Norton, 108 U. S. 237, 2 S. Ct. 490, 27 L. Ed. 709; *Winthrop Iron Co. v. Meeker*, 109 U. S. 180, 3 S. Ct. 111, 27 L. Ed. 898; *Milton v. U. S.*, 5th Cir. 1941, 120 F. 2d 794; *Smith v. Kincade*, 5th Cir. 1956, 232 F. 2d 306. This is true even though the merits of the cause may have been substantially decided by the trial court. *Life & Fire Insurance Co. v. Adams*, 34 U. S. (9 Pet.) 571, 9 L. Ed. 234. The majority agrees with this view but decides that the order of the district court is one granting an injunction and appealable under 28 U.S.C.A. § 1292 (a) (1). It would seem to be no injunction at all where the court directed something to be done and then provided that it need not be done unless required by a further order. As to the direction to submit a plan I think that the case of *Taylor v. Board of Education*, 2nd Cir. 1961, 288 F. 2d 600, cert. den. 368 U. S. 940, 82 S. Ct. 382, 7 L. Ed. 2d 339, is not only well considered, as the majority says, but is not to be distinguished from this case. I think the Second Circuit has stated a sound principle and that we should follow it. The failure of the Court to notice an absence of jurisdiction in *Orleans Parish School Board v. Bush*, 242 F. 2d 156, cert. den. 354 U. S. 921, 77 S. Ct. 1380, 1 L. Ed. 2d 1436, if jurisdiction was not there present, could hardly confer jurisdiction in a similar case where jurisdiction is not otherwise present.

The determination made by the majority on the merits of the appeal seems to me to be incorrect. The decision is based, as it must be, on *Brown v. Board of Education*. In the *Brown* case there had been a finding that:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." 347 U. S. 483, 494.

It was on these and similar fact findings that the Supreme Court made its determination that the racial segregation of pupils in public schools was inherently unequal. Laws and customs requiring such segregation deny unequal protection of the law to the class at which they are directed. By judicial alchemy the factual determination of *Brown* has been transmuted into a rule of law so that it is now conclusively presumed that racial segregation of pupils is detrimental to them and denies to them a constitutionally guaranteed right. *Stell v. Savannah-Chatham County Board of Education*, 5th Cir. 1963, 318 F. 2d 425.

It should be kept in mind, however, that the principles of law declared in *Brown* were dependent upon the actual

finding of injury to pupils. In this case it is found that "Negro personnel [teachers, principals, supervisory and operating personnel] are assigned to Negro schools and white personnel are assigned to white schools." The appellees, who were plaintiffs in the district court, are Negro children who are pupils in the public schools of Duval County, Florida. In their complaint they allege that they "and the members of their class, are injured by the policy of assigning teachers principals and other school personnel on the basis of the race and color of the children attending a particular school and the race and color of the person to be assigned." There was no proof made of the injury and no finding by the court that the policy of assigning Negro personnel to Negro schools and white personnel to white schools has a detrimental effect upon Negro children. No such finding of fact has been made in any other case, so far as I am aware.

In *Augustus v. Board of Public Instruction of Escambia County*, D.C.D.N. Fla. 1960, 185 F. Supp. 450, the complaint alleged, among other things, that the plaintiffs, Negro children, were injured by the policy of the School Board of assigning teachers, principals and other school personnel on the basis of the race and color of the children attending a particular school and color of the person to be assigned. The allegation was substantially the same as that in this case. In the *Escambia County* case the district court held that, as a matter of law, no rights of the Negro children plaintiffs were violated by the assignment of school personnel on the basis of race or color. The averments were stricken by the district court. This Court reversed, holding that fact issues were presented which should have been determined, and that the question should not have been disposed of on a motion to strike. *Augustus v. Board of Pub-*

lic Instruction, 5th Cir. 1962, 306 F. 2d 862. Here the district court has held that, as a matter of law, the Negro children plaintiffs had rights which were violated by the assignment of school personnel on the basis of race or color. It is my belief that there should be proof made of the injury resulting from the manner of assignment of personnel. I think it should be shown, if it can be shown, that the manner of assignment has a detrimental effect on the Negro children with a tendency to retard their educational and mental development, as was done in *Brown v. Topeka* with respect to segregation of pupils, or there should be shown some other detriment in proof of the allegation of the complaint.

The Supreme Court, in its second *Brown* case, said, as quoted in the opinion of the majority, that "the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units *to achieve a system of determining admission to the public schools on a nonracial basis*. . . ." 349 U. S. 294, 300-301. [Emphasis supplied.] *Brown* dealt with pupil segregation, not with assignments of school personnel. The comments of the Supreme Court are to apply to cases in which "admission to the public schools on a nonracial basis" is sought: "Admission to public schools" refers, surely, to admission of pupils. It cannot be said that teachers, principals and administrative personnel are "admitted" to the public schools. It is hardly persuasive authority for the proposition that racial segregation of school personnel is injurious to school pupils, to say that in cases involving the admission of pupils to public schools on a nonracial basis consideration may be given to school per-

sonnel. It does not follow that because injury to Negro children will be presumed from racial segregation of pupils in public schools, proof need not be made of the factual allegation that injury to Negro children as a class is caused by racial segregation of school personnel.

For the reasons which I have tried to outline, I

DISSENT.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1963

No. 20294

D. C. Docket No. 4598-Civ-J

BOARD OF PUBLIC INSTRUCTION OF DUVAL COUNTY, FLORIDA, ET AL.,

Appellants,

versus

DALY N. BRAXTON and SHARON BRAXTON, Minors, by Sadie Braxton, their mother and next friend; ET AL.,

Appellees.

Appeal from the United States District Court for the Middle District of Florida.

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and JOHNSON, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the appellants, Board of Public Instruction of Duval County, Florida, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Jones, Circuit Judge, Dissenting"

January 10, 1964

Issued as Mandate:

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20294

BOARD OF PUBLIC INSTRUCTION OF DUVAL COUNTY, FLORIDA, ET AL.
Appellants,

vs.

DALY N. BRAXTON and SHARON BRAXTON, Minors, by Sadie Braxton, their mother and next friend, ET AL.
Appellees.

Appeal from the United States District Court for the Middle District of Florida.

(February 20, 1964)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and JOHNSON, District Judge

PER CURIAM:

IT IS ORDERED that the petition for rehearing in the above styled and numbered cause be, and the same is hereby DENIED.

JONES, Circuit Judge, DISSENTS.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

DALY N. BRAXTON and SHARON BRAXTON, minors, by Sadie Braxton, their mother, and next friend, et al.,

Plaintiffs.

—vs—

No. 4598-Civ-J

THE BOARD OF PUBLIC INSTRUCTION OF DUVAL COUNTY, FLORIDA, a public body corporate, et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Filed Aug. 21, 1962.

All questions of fact and of law have been tried before and submitted to the Court for decision. Thereupon the Court makes the following

Findings of Fact.

1. Jurisdiction is vested in the Court by Title 28, United States Code, Section 1343(3). The rights herein sought to be redressed are rights secured by the due process and equal protection clauses of Amendment XIV to the Constitution of the United States. All defendants are school officials of

Duval County, Florida, a political subdivision of the State of Florida.

2. The relief sought is a permanent injunction enjoining the defendant school authorities of Duval County, Florida, their agents, employees, successors and all persons in active concert and participation with them from operating a compulsory biracial school system in Duval County, Florida and related relief.

The relief sought is an immediate injunction enjoining such unconstitutional operation, and specifically enjoining the maintenance of dual school zone lines or attendance area lines based on race and color, the assignment of pupils, teachers, principals and other professional school personnel, the approval of budgets making available funds, approving employment and construction contracts and approving policies, curricula and programs designed to perpetuate or maintain or support compulsory racially segregated schools, and all other school operations on the basis of race. In the alternative the plaintiffs prayed that the Court direct the defendants to submit a complete plan for the reorganization of the entire school system of Duval County into a unitary non-racial system; including the assignment of pupils, teachers, principals and other professional personnel, construction of schools, and the drawing of school zone lines on a non-racial basis and providing for the elimination of all other color distinctions in the school system.

3. The plaintiffs are minor Negro citizens and residents of Duval County, Florida and of the United States, pupils in the Duval County school system. The suit is brought by their respective parents as next friends.

4. The suit is also brought on behalf of all other children and parents of Duval County who are similarly situated and affected by the complained of policy, practice, custom and usage. The Court finds that this suit presents a proper class action under Rule 23 (a)(3), F.R.Civ.P. Specifically, common questions of law and fact are involved affecting common rights, common grievances are asserted growing out of common wrongs and common relief is sought for each plaintiff and each member of the class. The plaintiffs fairly and adequately represent the class in whose behalf they sue.

5. The defendants in the case are: The Board of Public Instruction of Duval County, Florida; Raymond A. David, Chairman of said Board, Ned P. Searcy, A. E. Stokes, Martinez Baker and Charles Johnson, Jr., members of said Board; and the Superintendent of Schools of Duval County, Florida, Ish Brant. The defendant Board of Public Instruction maintains and operates the public school system of Duval County, Florida pursuant to the laws of the State of Florida, and its members are charged by said laws with the duty of operating a system of free public education in Duval County, and said Board is presently operating the public school of said county. The defendant Brant as the Superintendent of Schools, or Superintendent of Public Instruction, is the chief administrative officer of said Board.

6. The defendants, under color of the authority vested in them by the laws of Florida, have pursued and are presently pursuing a policy, custom, practice and usage of operating the public school system of Duval County, Florida on a racially segregated basis. This racially segregated school system come into being pursuant to the requirements of State law under which it operated up to May 17, 1954.

since that date, and at the time this suit was instituted, December 6, 1960, and up to the present time, said biracial school system has been and is presently continued, perpetuated and maintained by the defendant as a matter of policy, custom and usage.

7. The racially segregated school system operated by the defendants consisted on February 13, 1961 of 113 schools. Of this number 24 were attended by Negroes exclusively and the remainder were attended by white students exclusively. On February 13, 1961 there were approximately 101,000 students enrolled in the public schools of the county of which number approximately twenty-five percent were Negroes. There were no schools in the county attended by both Negro and white students. Under a numbering system adopted long prior to 1956 (and long prior to May 17, 1954) the schools numbered 1-99 and the schools numbered 200-300 are attended by white students and the schools numbered 100-199 are attended by Negro students. The principals, teachers and supervisory personnel of the Negro schools are Negroes and the principals, teachers and supervisory personnel of the white schools are white persons. The details of the operation of the school system are set out in the stipulation of facts entered into by counsel for the respective parties and filed before the Court on December 21, 1961. That stipulation is adopted by reference as a part of the findings of fact herein.

8. The stipulation of facts and the evidence adduced demonstrate that pupils are assigned to the schools in the county on the basis of residence and race except that in some instances transfers are permitted for overcrowding or other reasons not related to race. Elementary schools (grades 1-6 inclusive) have attendance area lines, with

separate attendance areas for Negro and white elementary schools, which in some areas overlap. Negro pupils are assigned to a Negro Junior or Senior High School upon graduation from elementary school and the same assignment or feeder system operates in the case of white elementary school pupils, who are assigned to white Junior or Senior High Schools. As indicated above the staffs of the respective schools are either white or Negro, in accordance with the race of the pupils. There are approximately 3,940 teachers and principals of whom 1,014 are Negro. The Negro schools are under the immediate supervision of an Assistant Director of Education, formerly known as the Director of Negro Education.

9. Following the passage of the Florida Pupil Assignment Law the defendant Board adopted a resolution on August 28, 1956 for the stated purpose of implementing that law. After adopting the resolution the Board held a meeting of principals at which time provisions of the law were explained and various forms of application and transfer forms were given to the principals and they were instructed in their use. These forms covered three situations, (a) when a pupil enrolls in the school system the first time, (b) when a child has moved its residence from one attendance area to another, and (c) when a child desires to attend a school located outside of his residence attendance area. Each year, from 1956 to date, the Board of Public Instruction has made a statement to the press, which local papers have published, that students may register at certain schools during certain periods. Such statements made no reference to race. During February, 1961, during the taking of the defendants' discovery depositions by plaintiffs' counsel, the defendants testified that they would process applications for transfer to schools under the provisions of the Florida Pupil Assign-

ment Law without regard to race or color. At the time of that testimony members of the press were present and thereafter newspaper articles publicized these statements of the School Board and the Superintendent.

10. During September, 1961, some fifteen or twenty Negro parents whose children were enrolled in the Isaiah Blocker elementary school sought to have their children transferred from that school to Brentwood elementary school, a white school, because of overcrowded conditions at the Blocker school. The forms provided for such request were not available at the Blocker School, and the requests were filled out on a different form. When these requests reached the Superintendent's office for action by the Board, by direction of the Superintendent (or one of his assistants) they were returned to othe Blocker school principal to be re-delivered to the parents. It appears from the evidence that this re-delivery, with attendant notification that the forms used were improper, was never effected. Except for these requests, no Negro parent has ever requested transfer for his child to a white school. No white parent has ever requested a transfer for his child to a Negro school.

11. Since the adoption of the Florida Pupil Assignment Law the defendants have operated the Duval County schools thereunder. That law has not been employed to accomplish desegregation of the public schools. Instead it has been used as an instrument and a means to perpetuate a policy, custom and usage of segregated schools. Pursuant to the law the defendants have assigned, reassigned and transferred Negroes to Negro schools and have assigned, reassigned and transferred white students to white schools.

The policy with respect to the assignment of personnel is precisely as it was prior to the Supreme Court decision of 1954 (Brown v. Board of Education of Topeka, 347 U.S. 483) and precisely as it was prior to the adoption of the Florida Pupil Assignment Law and the defendant Board's implementing resolution of August 28, 1956. Now as in the past, Negro personnel are assigned to Negro schools and white personnel are assigned to white schools.

12. The defendants have never, either by resolution or public announcement (other than the fortuitous circumstances of having their deposition testimony quoted by the public press [see finding of fact number 9 above]) abandoned their long established policy of operating the schools on a racially segregated basis. In the eight (8) years since the first Brown decision the defendants have not adopted any plan whatever for eliminating racial discrimination in the public school system committed to them for administration.

Conclusions of Law.

1. On and prior to May 17, 1954 the public school system of Duval County was operated on a compulsory biracial basis pursuant to the Constitution (Art. 12, Sec. 12) and the laws of the State of Florida (See F.S.A. Sec. 228.09; F.S.A. Sec. 230.23(6); former F.S.A. Sec. 242.25, repealed by Sec. 17, of Ch. 21989, Laws of Florida, 1943). Separate schools were constructed, operated and maintained, staffed by white personnel for white pupils only. Separate schools for Negro pupils only were constructed, maintained and operated, staffed by Negro personnel.

2. Despite the United States Supreme Court decisions in *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (May 17, 1954) and 349 U.S. 294 (May 31, 1955), and *Cooper v. Aaron*, 358 U.S. 1 (September 29, 1958) holding all state laws which either require or permit racial segregation in the public schools to be unconstitutional under the 14th Amendment, the defendants have continued to operate the Duval County School System on a racially segregated basis as a matter of custom, policy and usage. No steps have been taken by defendants to reorganize this bi-racial school system into a single, non-racial school system. No less than this is required by the Brown case, as interpreted by *Cooper v. Aaron*, 358 U.S. 1, at page 7.

3. The plaintiffs possess the right, arising under the due process and equal protection clauses of the 14th Amendment, with respect to the public school system of which they are a part, to have that system operated on a non-racial basis. This includes (a) pupil assignment upon a reasonable, non-racial basis; (b) assignment of teachers, principals and supervising and supporting personnel on a non-racial basis; (c) when attendance area lines are the basis of assignment, to have these lines drawn without regard to the race or color of the pupils in the area; (d) when the criteria of a pupil assignment law are used as the basis of assignment to have these criteria apply to all pupils in the system, not solely to Negro pupils seeking assignment to schools attended by white pupils only, or solely to white pupils seeking assignment to schools attended by Negro pupils only; and (e) the construction, designation, maintenance and operation of a single, non-racial system of schools. The last is to say that operated by the State or its agencies for white pupils only, nor may any school be constructed, designated, maintained and operated for Negro pupils only.

There may be no determinations based upon race or color, in whole or part, with respect to the operation of the public school system, or any of its components. The Brown case is misread and misapplied when it is construed simply to confer upon Negro pupils the right to be considered for admission to a "white" school. See *Brown v. Board of Education of Topeka*, supra; *Cooper v. Aaron*, supra; *Bosbn v. Rippy*, 285 F. 2d 43 (5 C.A. 1960); *Manning v. Board of P.I. of Hillsborough County, Florida*, 227 F. 2d. 370 (5 C.A. 1960); *Orleans Parish School Board v. Bush*, 242 F. 2d 156, (5 C.A. 1957), certiorari denied 354 U.S. 921.

4. The duty to initiate desegregation of the public school system of Duval County is upon the defendant school authorities, not upon the parents of enrolled pupils by requirement that their parents seek reassignment of their children to a school maintained for and attended by pupils of the opposite race. See *Cooper v. Aaron*, supra at page 7; *Manning v. Board of Public Instruction*, supra, at page 374.

5. The existence of the Florida pupil assignment law and the opportunity to apply thereunder for reassignment do not, automatically and ipso facto, relieve defendants of their duty to operate the school system under their charge on a non-racial basis. This proposition is clearly developed in the following Fifth Circuit cases, each arising in this District: Gibson I and Gibson II, 246 F. 2d 913 (1957) and 272 F. 2d 763 (1959); Holland, 258 F. 2d 730 (1958); and Manning, supra, (1960).

6. The evidence shows that the Florida Pupil Assignment Law has been applied by defendants in an unconsti-

tutional manner to effect an unconstitutional result, i.e., it has been applied in such a way as to perpetuate and maintain racial segregation in the public schools. In the 1956-1957 school year, and in each succeeding year, that law was applied to assign, reassign and transfer all Negro pupils to Negro schools and all white children to white schools. The law is therefore unconstitutionally applied. Such application must be enjoined. See, *Shuttlesworthy v. Board of Education of City of Birmingham* (N.D. Ala. 1958) 162 F. Supp. 373, 384, aff'd 358 U.S. 101; *Yick Wo v. Hopkins*, 118 U.S. 356, (1886); *Manning v. Board of Public Instruction*, supra at 374-375.

7. The Court of Appeals for the Fifth Circuit has already ruled in the Second Gibson case, supra, at p. 767 that the Florida Pupil Assignment Law could not be constitutionally applied within the framework of segregation. It there ruled that there must be some legally non-segregated schools provided before there can be any constitutional assignment of a pupil to a particular school. It has ruled that "the desegregation of the public schools may occur simultaneously with and be accomplished by the good faith application of the law providing for the assignment of pupils to particular schools." Gibson, supra at p. 767.

But in the instant case the evidence shows that the Florida Pupil Assignment Law has been used to perpetuate segregation and not to accomplish good faith desegregation. Therefore, the relief suggested by the Fifth Circuit in Gibson II is inappropriate and insufficient in the framework of the facts here. The Florida Pupil Assignment Law does not povide an adequate remedy here. See further *Augustus, a minor, etc. v. Board of Public Information of Escambia County, Florida*. (5 C.A. decided July 24, 1962, not yet reported).

8. In the instant case (and in similar cases) this Court is required by clear and binding precedent to frame a broad decree, granting to the plaintiffs in substance the injunctive relief sought by the complaint (filed December 6, 1960).

This is not to say that the decree should be made effective immediately. It should not. The opening of the 1962-1963 school session is only a few weeks off. Plans for that opening have had to go forward, pupils have been admitted and assigned class rooms, employment contracts with teachers, principals, supervisory personnel, school bus drivers, cafeteria workers, and the myriad of employees of a metropolitan school system have been entered into.

Perhaps a start could have been accomplished this fall if this Court had been more prompt in ruling after submission of this case. I thought last winter that it was desirable for one Judge to hear and determine the similar issues in three (3) school segregation cases then at issue and ready for trial in this district (this case, the Manning case in Hillsborough County and the Tillman case in Volusia County) in order that uniformity in essential findings, conclusions, decrees, and the application thereof could be effectively provided for. I am inclined now to view this as a mistake, since the net result has been to delay the entry of decrees in all three cases.

By entering the appropriate injunctive order, but by delaying its effective date for the time being, pending the submission of a complete plan for total elimination of the biracial aspects of the school system, I am hopeful that a reasonable start may now be made at the end of the first semester of the up-coming school year, that is to say, about the end of January, 1963.

Discriminatory application of the Florida Pupil Assignment Law or of any other standards of admissions, assignment or reassignment will be enjoined effective immediately. In other respects the effective date of the injunctive decree will be stayed to permit compliance by the defendants with the provisions of numbered paragraph 9 of these conclusions and the accompanying provisions of the decree, pending the further order of the Court.

9. The defendants will be required to submit to the Court by or before October 30, 1962, a complete plan for the removal of dual attendance zones for the system-wide opening of all schools on a non-racial basis, for the elimination system-wide of discriminatory assignment of teachers, principals, supervisory and operating personnel, as well as the elimination of discrimination racially in the construction, designation, budgeting of funds, maintenance and operation of all schools in the system. The two last named aspects of the plan may well require additional study to prepare, and longer time to put into effect. This may well be so for reasons entirely apart from any reluctance to discontinue discrimination; reasons stemming entirely from administrative and contractual considerations, within the expert knowledge of the defendants, and not at this time before the Court. The defendants and their counsel should understand that there is no disposition on the part of the Court to require the impossible, and that the difficulties and complexities of each stage of complete desegregation of the public schools will be given thorough consideration.

Equally they should understand that the utmost in good faith effort toward compliance on their part will be a continuing requirement.

10. At the opening of the schools in early September, 1962, and thereafter, independent of the submission and adoption of a complete plan of desegregation, the defendants will be expected and required to examine, assign, reassign, and transfer pupils throughout the system without racial discrimination to the extent that such pupils apply for and are found qualified for such transfer and reassignment under the Florida Pupil Assignment Law or any other standards to be applied. This follows from the immediate injunction against further unconstitutional application of that law. No reason exists for students found qualified upon impartial appraisal to be required to wait to be transferred for the submission and adoption of a plan for complete desegregation.

Decree accordingly.

BRYAN SIMPSON,
Chief Judge, Southern District
of Florida.

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DECREE FOR PERMANENT INJUNCTION.

Filed Aug. 21, 1962.

(Title Omitted.)

All questions of fact and of law herein were submitted for decision by the Court upon final hearing. Thereupon, and upon the Findings of Fact and Conclusions of Law filed herein, it is now by the Court.

Ordered, Adjudged and Decreed:

1. This Court has jurisdiction of this cause and of the parties hereto.

2. The equities of this cause are with the plaintiffs and against the defendants, and the plaintiffs are entitled to the relief prayed in and by the complaint (filed December 6, 1960) to the extent and in the manner granted hereby.

3. The defendants, The Board of Public Instruction of Duval County, Florida, the members of said Board, to-wit: Raymond A. David, Chairman of said Board, Ned P. Searcy, A. E. Stokes, Martinez Baker and Charles Johnson, Jr., and Ish Brant, as Superintendent of Public Instruction of Duval County, Florida; and each of them, their successors in office, their agents, servants, employees, and all persons in active concert and participation with them, are, with respect to the public school system of Duval County, Florida, enjoined and restained permanently from allowing, permitting or committing all, or any of the following:

A. Continuing to operate a compulsory biracial school system in Duval County, Florida;

B. Continuing to maintain a dual scheme or pattern of attendance areas based upon race or color;

C. Assigning pupils to schools on the basis of race and color of the pupils;

D. Approving budgets, making available funds, approving employment contracts and construction programs, and approving policies, curricula and programs designed to perpetuate, maintain or support a school system operated on a racially segregated basis.

E. Assigning teachers, principals, and other supervising or supporting personnel to schools on the basis of the race and color of the persons to be assigned and or the race and color of the pupils attending the schools to which the personnel are assigned; and

F. Applying the criteria of the Florida Pupil Assignment Law, or any other criteria for admission, assignment, or reassignment, to schools other than uniformly and without racial discrimination as to use or application thereof (see paragraphs 5, 6, 7 and 10 of the Conclusions of Law filed herewith for clarification).

4. (a) The provisions of subparagaph F of paragraph 3 above are effective immediately and system-wide throughout the county.

(b) The provisions of subparagraphs A, B, C, D and E of paragraph 3 above shall not be effective until the further order of this Court.

(c) The defendants are directed, on or before October 30, 1962, to subm.it to the Court for its consideration a

detailed and comprehensive plan for putting subparagraphs A, B, C, D and E of paragraph 3 above into effect throughout the Duval County public school system.

(d) Upon the filing of said plan and hearing thereon, the Court will enter its supplemental decree herein accepting or rejecting the same in whole or in part and making such further disposition as right and justice may require.

5. Actual issuance and service upon the defendants of a formal injunction is deemed unnecessary. Instead the Clerk of this Court is directed to deliver by certified mail to each of the defendants and to their counsel of record certified copies hereof. As officials of this Court said counsel are made individually responsible for acquainting the defendant Board and each of the individual defendants in detail with the provisions of this decree and explaining to them the force and application hereof.

6. The plaintiffs shall have and recover of and from the defendants herein their taxable costs, hereby fixed at $ for which let execution issue.

7. Jurisdiction of this cause is specifically retained in all aspects thereof.

Done and Ordered in Chambers, at Jacksonville this 21st day of August, 1962.

BRYAN SIMPSON
Chief Judge, Southern District
of Florida

APPENDIX "G"

Leslie TAYLOR and Kevin Taylor, minors, by Wilbert Taylor and Hallie Taylor, their parents and next friend, et al., Plaintiffs-Appellees,

v.

BOARD OF EDUCATION OF the CITY SCHOOL DISTRICT OF the CITY OF NEW ROCHELLE et al., Defendants.

288 F. 2d 600.
CA 2 (1961)

FRIENDLY, Circuit Judge.

In this action, eleven Negro children, proceeding through their parents, seek declaratory and injunctive relief against the Board of Education of New Rochelle, New York, and the Superintendent of Schools. On January 24, 1961, Judge Kaufman signed an opinion, 191 F.Supp. 181, stated to constitute the District Court's findings of fact and conclusions of law, which held that various acts of the defendants violated plaintiffs' constitutional rights as defined in *Brown v. Board of Education*, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, and later decisions of the Supreme Court. The opinion ended with two paragraphs, quoted in the margin,[1]

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[1] The Decree

"In determining the manner in which the Negro children residing within the Lincoln district are to be afforded the opportunities guaranteed by the Constitution, I will follow the procedure authorized by the Supreme Court in Brown v. Board of Education, 349 U.S. 294 [75 S. Ct. 753, 99 L.Ed. 1083] (1955), and utilized by many district courts in implementing the Brown principles. Thus, I deem it unnecessary at this time to determine the extent to which each of the items of relief requested by plaintiffs will be afforded. Instead, the Board is hereby ordered to present to this Court, on or before April 14, 1961, a

in which the District Judge stated, among other things, that he deemed it "unnecessary at this time to determine the extent to which each of the items of the relief requested by plaintiffs will be afforded," [191 F.Supp. 198] but would defer such determination until the Board had pesented, on or before April 14, 1961, "a plan for desegregation in accordance with this Opinion, said desegregation to begin no later than the start of the 1961-62 school year."

[1, 2] Pursuant to authorization by a 5-3 vote at a meeting of the Board of February 7, 1961, defendants appealed to this Court on February 20, 1961. On March 7, 1961, the District Judge denied an application by them to extend the date for filing a plan pending determination of the appeal, as well as a motion by plaintiffs for an order directing defendants immediately to assign plaintiffs to elementary schools other than the Lincoln School. Thereupon, defendants moved this Court for a stay of the direction to file a plan pending the appeal. At the hearing on that motion, the Court questioned whether the appeal had not been prematurely taken and was not, therefore, beyond the appellate jurisdiction conferred upon the Court by Congress. Later we directed the filing of briefs on this issue and extended the Board's time to file the plan pending the Court's decision on the question of jurisdiction and in any event to May 3, 1961. Appellees now challenge our power to hear an appeal at this stage, but the question is one this Court was obliged to raise in any event, *Mitchell v. Maurer*, 1934, 293 U.S. 237, 244, 55 S.Ct. 162, 79 L.Ed. 338, and it is better that this be determined now rather than after further time

plan for desegregation in accordance with this Opinion, said desegregation to begin no later than the start of the 1961-62 school year. This court will retain jurisdiction of this action until such plan has been presented, approved by the court, and then implemented.

"The foregoing Opinion will constitute the court's findings of fact and conclusions of law."

has elapsed. Upon full consideration, we conclude that we have no power to entertain the Board's appeal until the District Court has finished its work by directing the Board to take or refrain from action.

Familiar decisions of the Supreme Court establish the controlling principles. "Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all." *Cobbledick v. United States*, 1940, 309 U.S. 323, 324-325, 60 S.Ct. 540, 541, 84 L.Ed. 783. "The foundation of this policy is not in merely technical conceptions of 'finality.' It is one against piecemeal litigation. 'The case is not to be sent up in fragments * * *' *Luxton v. North River Bridge Co.*, 147 U.S. 337, 341 [13 S.Ct. 356, 358, 37 L.Ed. 194]. Reasons other than conservation of judicial energy sustain the limitation. One is elimination of delays caused by interlocutory appeals." *Catlin v. United States*, 1945, 324 U.S. 229, 233-234, 65 S.Ct. 631, 634, 89 L.Ed. 911.

[3, 4] A "final decision" within 28 U.S.C. § 1291, the basic statute authorizing appeals to the courts of appeals, and its predecessors going back to §§ 21 and 22 of the Act of Sept. 24, 1789, c. 20, 1 Stat. 73, 83-84, "is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, supra, 324 U.S. at page 233, 65 S.Ct. at page 633. Plainly Judge Kaufman's decision of January 24, 1961 does not fit that description. It constituted only a determination that plaintiffs were entitled to relief, the nature and extent of which would be the subject of subsequent judicial consideration by him. What remained to be done was far more than

those ministerial duties the pendency o fwhich is not fatal to finality and consequent appealability. *Ray v. Law*, 1805, 3 Cranch 179, 180, 2 L.Ed. 404. An order adjudging liability but leaving the quantum of relief still to be determined has been a classic example of non-finality and non-appealability from the time of Chief Justice Marshall to our own. The Palmyra, 1825, 10 Wheat. 502, 6 L.Ed. 375; *Barnard v. Gibson*, 1849, 7 How 650, 12 L.Ed. 857; *Leonidakis v. International Telecoin Corp.*, 2 Cir., 1953, 208 F.2d 934; 6 Moore, Federal Practice (1953 ed.), p. 125 and fn. 5, although in all such cases, as here, this subjects the defendant to further proceedings in the court of first instance that will have been uncalled for if that court's determination of liability is ultimately found to be wrong. Recognizing that this may create hardship, Congress has removed two types of cases from the general rule that appeals may not be taken from decisions that establish liability without decreeing a remedy—namely, decrees "determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed," 28 U.S.C. § 1292(a) (3), added by the Act of April 3, 1926, c. 102, 44 Stat. 233, and "judgments in civil actions for patent infringement which are final except for accounting": 28 U.S.C. § 1292(a), (4), added by the Act of Feb. 28, 1927, c. 228, 44 Stat. 1261. Congress' specification of these exceptions, manifestly inapplicable here, underscores the general rule.

This salutary Federal rule requiring finality as a condition of appealability has become subject, over the years, to exceptions other than those just mentioned, some fashioned by the courts and others enacted by Congress. The instant appeal does not come within any.

[5, 6] Of the judicially created exceptions, the one

referred to in *Dickinson v. Petroleum Conversion Corporation*, 1950, 338 U.S. 507, 70 S.Ct. 322, 94 L.Ed. 299, namely, that under some circumstances a decree may be final as to one party although the litigation proceeds as to others, is so manifestly inapplicable that we would not mention it if appellants had not. Similarly inapplicable is the rule in *Forgay v. Conrad*, 1848, 6 How. 201, 12 L.Ed. 404, that a judgment directing a defendant to make immediate delivery of property to a plaintiff is appealable despite a further provision for an accounting. The scope of this doctrine is narrow and rests upon "the potential factor of irreparable injury." 6 Moore, Federal Practice (1953 ed.), p. 129—just how narrow is shown by decisions refusing to apply it to a decree that adjudged rights in property but made no disposition of the property pending a further hearing relating to its precise identification, *Rexford v. Brunswick-Balke-Collender Co.*, 1913, 228 U.S. 339, 33 S.Ct. 515, 57 L.Ed. 864, or to a decree awarding possession to the United States under eminent domain but reserving the question of compensation, *Catlin v. United States*, supra, 324 U.S. at page 232, 65 S.Ct. at page 633, overruling our contrary decision in *United States v. 243.22 Acres of Land*, 2 Cir., 1942, 129 F.2d 678. See *Republic Natural Gas Co. v. State of Oklahoma*, 1948, 334 U.S. 62, 68 S.Ct. 972, 92 L.Ed. 1212. Here, while we understand defendants' dislike of presenting a plan of desegregation and attending hearings thereon that would be unnecessary if the finding of liability were ultimately to be annulled, and also the possibly unwarranted expectation this course may create, this is scarcely injury at all in the legal sense and surely not an irreparable one. Equally inapposite is the doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 1949, 337 U.S. 541, 545-547, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528, also advanced by appellants, permitting review of orders "which finally determine claims of right sepa-

rable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Here the issue sought to be reviewed, far from being collateral to the main litigation, represents the very findings and conclusions upon which any final judgment against the defendants must rest.

[7] Turning to statutory exceptions, the only one that could be, and is, claimed to be applicable is 28 U.S.C. § 1292(a)(1). That gives us jurisdiction over "Interlocutory orders of the district courts * * * granting, continuing, modifying, refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court." The term "injunction" includes not only an order prohibiting certain conduct during the pendency of litigation but also one that commands it. *Societe Internationale, etc. v. McGrath*, 1950, 86 U.S.App.D.C. 157, 180 F.2d 406.

Appellants contend Judge Kaufman's decision granted both a prohibitory and a mandatory injunction. They say the order "in effect" prohibited them from proceeding with their plans to reconstruct the Lincoln school and commanded them to submit a plan. If the former were so, the order would clearly be appealable; we have searched the opinion for substantiation but in vain. To be sure, the opinion says the proposed reconstruction alone might aggravate the problem rather than ameliorate it, and we fully appreciate why the Board may hesitate to proceed in the light of this, as, indeed, it might have if the opinion had not yet been rendered. But as yet we can only conjecture whether the District Court will enjoin the rebuilding or permit this if accompanied by other acts; and a defendant's apprehension that conduct on his part may ultimately be restrained is not an "injunction" within § 1292(a)(1).

[8, 9] Whether Judge Kaufman's direction for the submission of a plan on April 14 is a mandatory injunction requires, in the first instance, interpretation of what was said. It is common practice for an equity judge first to reach a conclusion as to liability and to determine the appropriate relief later in the event of an affirmative finding. If the District Judge had said in his opinion only that a further hearing would be held at which the parties would have an opportunity to express themselves as to relief, by testimony, argument, or both, it would be entirely plain that he had not granted a mandatory injunction, and this would be so even if he had also stated that, in the interest of orderly procedure, he would expect the defendants to take the lead at the hearing. In substance this is what Judge Kaufman did. Although the penultimate paragraph of his opinion is headed "The Decree," the context makes clear that the few sentences that follow were not, themselves, decretal, but simply explained how he planned to fashion his decree. To be sure, the opinion used the word "ordered" with respect to the filing of a plan, just as courts often "order" or "direct" parties to file briefs, findings and other papers. Normally this does not mean that the court will hold in contempt a party that does not do this, but rather that if he fails to file by the date specified, the court may refuse to receive his submission later and may proceed without it. That this was what Judge Kaufman intended is confirmed by his later opinion denying an extension of the April 14 date, in which he spoke of having "specifically requested the Board to submit its plan for desegregation of the Lincoln School" and of having given the Board "an opportunity to submit" such a plan. Moreover, even if the order was intended to carry contempt sanctions, which we do not believe, a command that relates merely to the taking of a step in a judicial proceeding is not generally regarded as a mandatory

injunction, even when its effect on the outcome is far greater than here, 6 Moore, Federal Practice (1953 ed.) pp. 46-47.[2] For just as not every order containing words of restraint is a negative injunction within 28 U.S.C. § 1292(a)(1), *Baltimore Contractors, Inc. v. Bodinger*, 1955, 348 U.S. 176, 75 S.Ct. 249, 99 L.Ed. 233; *Fleischer v. Phillips*, 2 Cir., 1959, 264 F.2d 515, 516, certiorari denied 1959, 359 U.S. 1002, 79 S.Ct. 1139, 3 L.Ed.2d 1030; *Grant v. United States*, 2 Cir., 1960, 282 F.2d 165, 170, so not every order containing words of command is a mandatory injunction within that section.

[10] Our review of the cases that have reached appellate courts in the wake of *Brown v. Board of Education*, supra, and its supplement, 1955, 349 U.S. 294, 75 S.Ct. 753, has revealed only one in which jurisdiction may have been taken under such circumstances as here. In *Clemons v. Board of Education of Hillsboro*, 6 Cir., 1956, 228 F.2d 853; *Bown v. Rippy*, 5 Cir., 1956, 233 F.2d 796; *Booker v. State of Tennessee Board of Education*, 6 Cir., 1957, 240 F.2d 689, and *Holland v. Board of Public Instruction*, 5 Cir., 1958, 258 F.2d 730, the appeals were from final orders denying injunctive relief. In *Aaron v. Cooper*, 8 Cir., 1957, 243 F.2d 361, an injunction was denied because of a voluntary plan offered by the Little Rock School District which the District Court found satisfactory, but jurisdiction was retained; since the order denied an injunction it was therefore

[2] For clarity we note what ought be obvious, namely, that the Board's submission of a plan of desegregation implies no acceptance of the District Judge's determinations of fact and law and no waiver of a right to appeal—any more than does the action of a losing party in any suit, either at the request of the court or of his own volition, in submitting a form of judgment conforming with findings and conclusions from which he dissents.

appealable whether it was deemed final or interlocutory.[3] In *Board of Supervisors of L. S. U. etc. v. Ludley*, 5 Cir., 1958, 252 F.2d 372, certiorari denied, 1958, 358 U.S. 819, 79 S.Ct. 31, 3 L.Ed.2d 61; *Board of Supervisors of L. S. U., etc. v. Wilson*, 1951, 340 U.S. 909, 71 S.Ct. 294, 95 L.Ed. 657, and *Evans v. Buchanan*, 3 Cir., 1958, 256 F.2d 688,[4] the District Court had issued mandatory injunctions directing the admission of Negro students. In *Boson v. Rippy*, 5 Cir., 1960, 275 F.2d 850, the appeal was from a refusal to modify an injunction so as to advance the dates of desegregation, this falling within another provision of § 1292(a)(1). The single case that may support appealability here is an unreported memorandum in *Mapp v. Board of Education of Chattanooga*, in which the Sixth Circuit denied a motion to dismiss an appeal, without discussion save for a reference to 28 U.S.C. § 1291 and § 1292(a)(1) and a "cf." to *Boson v. Rippy*, supra. We doubt that appellees' attempt to distinguish the Mapp case is successful, but we do not find the memorandum persuasive. *Boson v. Rippy* does not support the decision, for the reason indicated, as the manner of its citation perhaps recognized, and we do not know what it was that the judges found in the statutes to support their conclusion of appealability. Moreover, the subsequent proceedings in the Mapp case, where the District Court has already rejected the plan directed to be filed and required the submission of a new one, with a second appeal taken from

[3] Later cases involving the Little Rock situation, Thomas v. Cooper, 8 Cir., 1958, 254 F.2d 808; Aaron v. Cooper, 8 Cir., 1958, 257 F.2d 33, affirmed Cooper v. Aaron, 1958, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5; Aaron v. Cooper, 8 Cir., 1958, 261 F.2d 97, indicated a reluctance to frustrate or delay effectuation of the plan previously approved.

[4] The Court of Appeals noted in the Evans opinion, 256 F.2d at page 691, that in one of the seven cases the District Court had earlier made an order directing the submission of a plan from which "an appeal * * * was taken in this court but was not prosecuted and accordingly the record was returned to the court below." The later appeal, Evans v. Ennis, 3 Cir., 1960, 281 F.2d 385, was from a final order approving a plan which plaintiff deemed inadequate.

that order although the first appeal has not yet been heard, indicate to us the unwisdom of following that decision even if we deemed ourselves free to do so.

There is a natural reluctance to dismiss an appeal in a case involving issues so important and so evocative of emotion as this, since such action is likely to be regarded as technical or procrastinating. Although we do not regard the policy question as to the timing of appellate review to be fairly open, we think more informed consideration would show that the balance of advantage lies in withholding such review until the proceedings in the District Court are completed. To stay the hearing in regard to the remedy as appellants seek, would produce a delay that would be unfortunate unless we should find complete absence of basis for any relief—the only issue that would now be open to us no matter how many others might be presented, since we do not know what the District Judge will order—and if we should so decide, that would hardly be the end of the matter. On the other hand, to permit a hearing on relief to go forward in the District Court at the very time we are entertaining an appeal, with the likelihood, if not indeed the certainty, of a second appeal when a final decree is entered by the District Court, would not be conducive to the informed appellate deliberation and the conclusion of this controversy with speed consistent with order, which the Supreme Court has directed and ought to be the objective of all concerned. In contrast, prompt dismissal of the appeal as premature, should permit an early conclusion of the proceedings in the District Court and result in a decree from which defendants have a clear right of appeal, and as to which they may then seek a stay pending appeal if so advised. We—and the Supreme Court, if the case should go there—can then consider the decision of the District Court, not in pieces but as

a whole, not as an abstract declaration inviting the contest of one theory against another, but in the concrete. We state all this, not primarily as the reason for our decision not to hear an appeal at this stage, but rather to demonstrate what we consider the wisdom embodied in the statutes limiting our jurisdiction, which we would be bound to apply whether we considered them wise or not.

Accordingly, the appeal is dismissed for want of appellate jurisdiction at this time. Although it should not be necessary to do so, we add, from abundant caution, that this dismissal involves no intimation on our part with respect to the propriety or impropriety of the determination of the District Court. If defendants feel that the time that has been required for the disposition of this issue compels them to request a further extension of the date for presenting a plan, they should make their application to the District Judge.

MOORE, Circuit Judge (dissenting).

This case comes before us on a motion for a stay of that portion of a decree wherein the Board of Education of New Rochelle is "ordered to present to this Court [Irving R. Kaufman, *D. J.*], on or before April 14, 1961, a plan for desegregation[1] in accordance with this [his] Opinion * * *." An appeal "from the judgment entered in this action on January 24, 1961" (the date judgment was entered by the Clerk upon the trial court's opinion which was to constitute the court's findings of fact and conclusions of law) is now pend-

[1]The schools of New Rochelle have never been on a segregated basis in the sense that any Negro pupil has been denied admission to any school by reason of being a member of the Negro race and as the term is used in Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, and related cases. All the schools had Negro pupils in their student bodies.

ing in this court and representations have been made that it can be heard at a comparatively early date. Upon oral argument of the motion, the court on its own motion raised the question of appealability; the parties themselves initially did not present this issue either by motion or on argument. How the panel of this court which might have heard the appeal would have ruled on the question of appealability is academic because by the decision of the majority of this panel, they will not have that opportunity. I would have deferred to them and let them have the privilege of deciding whether they should hear and decide on the merits. However, having to face this question now; I am of the opinion that an appeal may properly be taken from the judgment as entered.

The complaint, charging maintenance of "a racially segregated public elementary school," "ghettos," "minority racial groups," and denial of "due process" and "equal protection," seeks injunctive relief, both affirmative and negative, against the Board:

> A. Declaring illegal and unconstitutional the City's "neighborhood school" policy (whereby children attend the school in the area of their residence);
>
> B. Enjoining attendance in a "racially segregated" school;
>
> C. Requiring registration in a "racially integrated" school;
>
> D. Enjoining the construction of a public school approved for construction; and
>
> E. Enjoining prosecution of an action commenced by the defendants.

The character of the action as an injunction proceeding

was clearly established by the allegations and the relief sought. A trial was held and a judgment was entered. The trial court throughout its opinion referred to the injunctive relief sought, which was granted in both mandatory and prohibitory form.

Section 1292(a)(1) gives this court appellate jurisdiction over interlocutory orders "granting * * * injunctions." As the majority concedes, the term "injunction" embraces an order commanding as well as prohibiting conduct. The decree (entered as a judgment) in my opinion definitely is within this category. The words are "the Board is hereby ordered to present to this Court * * * a plan for desegregation in accordance with this Opinion." The majority say that if the order in effect prohibited the Board from reconstructing the Lincoln School, the order would be "clearly appealable." Yet in the "Opinion" which is to serve as a guide for a Plan, the trial court has said, "this [the rebuilding] seems the one sure way to render certain continued segregation at Lincoln." How can this statement, together with the finding that "it is most difficult to conceive of the rebuilding of the Lincoln School as good-faith compliance with an obligation to desegregate," be reconciled with the thought that no injunction is intended. Here is virtually a pre-hearing judgment that any Plan which incorporates a rebuilding of the school on its present site will be inconsistent with the court's conception of desegregation. My colleagues cannot seriously believe that these words are not words of restraint and should not be regarded as an injunctive deterrent from building a new school. No Board would spend thousands of dollars for a new school only to be directed eventually to tear it down and build it elsewhere.

The mandatory provisions of the judgment are both

direct and implied. If "the presence of some 29 white children certainly does not affod the 454 Negro children in the school the education and social contacts and interaction envisioned by Brown," how many additional white children will be required to accomplish this result?[2] And where will they come from? The trial court does not "conceive it to be the court's function to interfere with the mechanics of the operation of the New Rochelle school system," and "did not strike down the neighborhood school policy," but found it to be "valid only insofar as it is operated within the confines established by the Constitution." Yet the Board must submit an acceptable Plan in the light of the Court's Opinion to "avoid that very eventuality," namely, "the Court's taking over the running of the New Rochelle school system."

Reference to these situations is made only because I believe that they relate to the injunctive character of the judgment. It is this character which determines appealability—the only question now being considered. The merits must be considered later upon hearings in which it would appear that the Lincoln School and the Negro pupils will not be alone. Already notice has been served that "the Ward School is predominently [sic] Jewish and the Columbus School predominently [sic] Italian in the composition of the student bodies." The parents of the children "desire that action be brought to desegregate[3] both schools." Warning is given that "if plans are made to correct the situation existing in the Lincoln School, brought about by the neighborhood school concept, that such plans also bear in mind the religious and other inbalances [sic] also existing." When all the

[2]How can any court be sure that mere numbers can effect these assumed advantages?

[3]Here the word is used to indicate a predominant percentage of any race—quite a different meaning from that intended in the true "desegregation" cases.

racial, religious and "other imbaalnces" have been thoroughly aired, although premature at this time, the hope is expressed that somehow the American philosophy that constitutional rights are the vested heritage of all our citizens and are not the exclusive property of any racial or religious group to be used for their own particular interests may find its way into the Plan—even if only in a footnote.[1]

Because I believe that the statute permits an appeal from this injunctive judgment, I would grant the stay, and I dissent from the dismissal of the appeal.

[1] Every assurance of this approach is given in the two well-reasoned opinions below. My dissent is based solely upon the belief that under the law the judgment entered in this case granting the relief specified therein is appealable.

James Jonathan MAPP et al., Plaintiffs-Appellants,

v.

The BOARD OF EDUCATION OF the CITY OF CHATTANOOGA, TENNESSEE, et al., Defendants-Appellees.
James Jonathan MAPP et al., Plaintiffs-Cross Appellees,

v.

The BOARD OF EDUCATION OF the CITY OF CHATTANOOGA, TENNESSEE, et al., Defendants-Cross-Appellants.

319 F. 2d 531, CA, 6th, (1963)

O'SULLIVAN, Circuit Judge.

This school desegregation case involves the public schools of Chattanooga, Tennessee. The plaintiffs, a group of Negro public school children of Chattanooga, appearing by their parents, as next friends, filed their complaint on April 6, 1960, asking an injunction to compel the desegregation of that city's public schools. The Chattanooga schools were at that time admittedly segregated. In its answer, defendant school board admitted its duty to desegregate "with all deliberate speed," *Brown v. Board of Education*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, but answered that it had been, and was then, conducting a program of "elucidation" to prepare the community of Chattanooga for the initiation and carrying out of the desegregation commanded by the Brown decision. It insisted that further time was needed for such indoctrination and conditioning to the end that desegregation could have an orderly beginning and that, when started,

could be continued without the collisions, inefficiency and possible violence that might accompany too precipitate a start or too rapid accomplishment of total desegregation.

After motions for summary judgment were made by both parties, the District Judge sustained plaintiff's motion and directed defendant Board of Education to submit a plan of desegregation. The Board's first plan was disapproved. Thereupon, defendants appealed to this Court, attacking the orders granting plaintiff's motion for summary judgment and rejecting the Board's first plan. We sustained the District Court's orders. *Mapp v. Board of Education of City of Chattanooga*, 6 Cir., 295 F.2d 617 (1961). Further hearings were conducted with the Board submitting successive plans, until the judgment or decree here involved was entered in April of 1962. The plan approved by that decree will accomplish complete desegregation of Chattanooga's public schools by September 1, 1969; the elementary grades on September 1, 1964; the junior high schools by September 1, 1967; the senior high schools by September 1, 1968; and the post-high-school technical institute by September 1, 1969. All parties appear to find this broad scheme of desegregation acceptable. Plaintiffs and defendants, however, both object to, and have appealed from, specific portions of the District Court's orders and decrees, which we discuss below.

1. *Notice of Intent and Transfer Privilege* (Appeal No. 15039)

[1] a) *Notice of Intent.* The initial step of the submitted plan was to desegregate on September 1, 1962, the first three primary grades in some sixteen designated schools. The plan provided for "a new single school zone" for each of such schools. Because of the year-by-year plan, there

would continue during its progress some schools totally or partially segregated under what had been the "dual zone" system. Item V of the defendants' plan provided in part as follows:

> "V. Admission to Schools by Single Zone.
>
> "1. Beginning with the school year 1962-63, students in grades one, two and three residing within a new single school zone which places the pupil in a different school than the one he would attend under existing zones, may enroll in his new single zone school provided:
>
> "(a) said school has been desegregated by the Board of Education; and
>
> "(b) provided parents, guardians, or those acting in the position of parents of students desiring to enroll in said schools, shall file a written notice of intent with the Board of Education, at its official headquarters. * * *"

As did the District Judge, we find the quoted portion of item V unclear in its expressed requirements and purposes. Construing it, however, as permitting the continuance of some segregation in the first three grades initially to be desegregated, the District Judge said, "The Court does expressly disapprove of so much of the defendants' proposed admission plan as would require any student or parent to apply for or consent to implementation of desegregation in accordance with the Plan." We are in accord. Inasmuch as the requirement of "notice of intent" was apparently intended to apply only to the initial step to be taken on September 1, 1962, and we assume that, in obedience to the District Court's decree, such step was accomplished without requiring a "notice of intent," the matter is now moot. No further discussion is warranted.

[2] b) *Transfer Privilege.* Item VI of the Board's plan provided that during the progress of integration, students in desegregated schools could be given the privilege of transferring out of a desegregated school if the majority of the students in such school, or in a class thereof, were of a different race than the student seeking such transfer. The pertinent part of such Item VI is as follows:

"VI. Privilege of Transfer.

"1. "Upon receipt of applications, as provided in existing school board policy, transfer of students in desegregated schools may be granted when good cause therefor is shown.

"2. The following will be regarded as some of the valid reasons of good cause for transfer.

"(a) When a student would otherwise be required to attend a school where the majority of students in that school or in his class were of a different race."

The District Judge disapproved this transfer provision notwithstanding that we had, in *Kelley v. Board of Education of Nashville*, 270 F.2d 209, 215, 228 (C.A.6, 1959) cert. denied, 361 U.S. 924, 80 S.Ct. 293, 4 L.Ed.2d 240, affirmed a District Court's approval of a like provision for the schools of Nashville, Tennessee. He observed that, in the Kelley case we had said "[t]here is no evidence before us that the transfer plan is an evasive scheme for segregation," and that our affirmance was "on the record before us." He pointed to evidence in the case before him that the Nashville plan had worked toward a continuance of segregation. His opinion was announced prior to our opinions in *Goss v. Board of Education of City of Knoxville, Tenn.*, 301 F.2d 164 (C.A.6, 1962) and *Maxwell v. County Board of Education of David-*

son County Tenn., 301 F.2d 828. In these cases we affirmed District Court approval of transfer plans identical in effect with the one before us here. We felt that our Kelley decision (Cert. denied) committed approval of such provisions to the discretion of the District Judge, with power to control and prevent misuse. In Goss and Maxwell we followed Kelley with the observation that "[w]e do not think the transfer provision is in and of itself illegal or unconstitutional. It is the use and application of it that may become a violation of constitutional rights. * * *. We adhere to our former ruling (Kelley) with the admonition to the board that it cannot use this (the transfer privilege plan) as a means to perpetuate segregation." (301 F.2d 168).

Our Goss and Maxwell decisions have now been reversed by the Supreme Court. *Goss v. Board of Education of City of Knoxville, Tennessee*, et al., and *Maxwell v. County Board of Education of Davidson County, Tenn.*, et al., 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632 (1963). The Court declares that the transfer privilege involved in the case at bar is unconstitutional and no discretion, therefore, remains in a District Judge to approve its inclusion in a plan, regardless of his control of its use.

We affirm the District Court's disapproval of the Board's Notice of Intent provision (Item V) and its Transfer Privilege (Item VI).

2. *Integration of assignment of Teachers, Principals and other School Personnel.* (Appeal No. 15038)

Prior to the commencement of this litigation and, we assume, up to taking the first step of desegregation on September 1, 1962, the City of Chattanooga maintained a bi-

racial (segregated) school system. Only Negro teachers and principals were assigned to the Negro schools, and only white teachers and principals were assigned to white schools.[1] The administrative staff of the school system was filled entirely by white personnel. No teachers, principals or other school personnel, Negro or white, were parties to the litigation.)

The complaint averred that:

> "The plaintiffs, and members of their class, are injured by the policy of assigning teachers, principals and other school personnel on the basis of the race and color of the children attending a particular school and the race and color of the person to be assigned. Assignment of school personnel on the basis of race and color is also predicated on the theory that negro teachers, negro principals and other negro school personnel are inferior to white teachers, white principals and other white school personnel and, therefore, may not teach white children."

and the prayer of the complaint asked that the Court:

> "Enter a decree enjoining defendants their agents, employees and successors from assigning teachers, principals and other school personnel to the schools of the City of Chattanooga on the basis of the race and color of the person to be assigned and on the basis of the race and color of the children attending the school to which the personnel is to be assigned."

or, in the alternative, require that any reorganization of the school system "include a plan for * * * the assignment of

[1] An unimportant exception was that one white language teacher taught Russian in the Negro school and a Negro teacher was teaching by television in white schools.

teachers, principals and other school personnel on a non-racial basis. * * *"

Before answering plaintiff's complaint, defendants moved the Court to strike the above quoted portions thereof. The asserted grounds for the motion were that the teachers, principals and administrative personnel were not parties to the suit nor members of the class represented by plaintiffs, that such allegations raised an immateial issue, that failure to assign Negro teachers and principals to white schools could not affect plaintiffs' rights, and that a court could not substitute its judgment for the judgment and discretion of the school authorities in such regard "in the absence of substantial express statements of fact indicating arbitrary, capricious, fraudulent or illegal action on the part of the Superintendent of Schools or the Board of Education."

The motion to strike was granted. In his memorandum opinion on the motion, the District Judge observed:

> "* * * if statements in pleadings are immaterial or impertinent, whereby they do not raise a justiciable question, and time and effort can be saved, the courts should take action.
> "The question presented by the motion in this suit is whether, as an element of integration, the defendants can be enjoined from declining to employ school principals, teachers, and other personnel on the sole basis of race or color."

He concluded by saying:

> "In this type suit the question of failure (sic) to assign school teaching personnel on the basis of race or color cannot properly be presented."

If the Court's ruling could be considered merely as a discretionary determination that consideration of the involved question should be deferred until development of the facts, we would be inclined to find no abuse of discretion. However, under the circumstances, we must look upon the Court's order as a final decision on an important question of substantive law, and not merely a matter of procedure.

[3, 4] We agree that the teachers, principals and others are not within the class represented by plaintiffs and that plaintiffs cannot assert or ask protection of some constitutional rights of the teachers and others, not parties to the cause. We, however, read the attack upon the assignment of teachers by race not as seeking to protect rights of such teachers, but as a claim that continued assigning of teaching personnel on a racial basis impairs the students' rights to an education free from any consideration of race. Neither by the first Brown decision, nor by its later decisions has the Supreme Court ruled upon the question of law presented. None of the Circuits have ruled upon the question. The case of *Augustus v. Board of Public Instruction*, 306 F.2d 862, 869 (C.A.5, 1962), relied on by plaintiffs is not dispositive of the question. There the Fifth Circuit reversed a District Court's granting of a motion to strike identical allegations to those before us. It did not attempt to decide whether assignment of Negro teachers and principals to schools totally or predominantly Negro, or whether assignment of white teachers and principals to schools totally or predominantly white, offends any constitutional rights of school children. Neither did it decide that the constitution requires that the administrative personnel of a school district must contain some Negroes. It merely held that the allegations which presented such questions should be allowed to remain as part of the pleadings in the case, recognizing that in the

progress of the plan of desegregation there involved, the question might indeed become moot. We consider the Fifth Circuit's ruling as a proper one, except as it relates to school personnel other than teachers and principals. We make it clear, however, that we are not passing upon the legal question presented as it relates to the assignment of teachers and principals.

In *Brown & Williamson Tobacco Corp. v. United States*, 201 F.2d 819, 822 (C.A. 6, 1953), we took occasion to say:

> "Partly because of the practical difficulty of deciding cases without a factual record it is well established that the action of striking a pleading should be sparingly used by the courts. *Colorado Milling & Elevator Co. v. Howbert*, 10 Cir., 57 F.2d 769. It is a drastic remedy to be resorted to only when required for the purposes of justice. *Batchelder v. Prestman*, 103, Fla. 852; 138 So. 473; *Collishaw v. American Smelting & Refining Co.*, 121 Mont. 196, 190 P.2d 673. The motion to strike should be granted only when the pleading to be stricken has no possible relation to the controversy. *Samuel Goldwyn, Inc., v. United Artists Corporation*, D.C., 35 F.Supp. 633; *Wooldridge Mfg. Co. v. R. G. La Tourneau, Inc.*, D.C., 79 F.Supp. 908."

Applying such principles to the matter before us, we think it appropriate that the stricken allegations of the complaint, insofar as they relate to the assignment of teachers and principals, be restored to the pleading and that decision of the legal question presented await developments in the progress of the plan approved. Nothing we have said need call for any present taking of testimony on the subject of teacher and principal assignment. Within his discretion, the District Judge may determine when, if at all, it becomes necessary

to give consideration to the question under discussion. We affirm, however, the order granting the motion to strike, to the extent that it applies to allegations relating to the hiring and assignment of school personnel other than teachers and principals.

3. *Interim Unavailability of Certain Special Courses to Negroes.* (Appeal No. 15038)

The Chattanooga senior high schools, Brainerd, Chattanooga, Howard and Kirkman Technical High School and the Chattanooga Technical Institute, will continue segregated until reached in the approved plan of desegregation—the senior high schools on September 1, 1968 and the Chattanooga Technical Institute on September 1, 1969. Segregation of these schools was by tradition and custom, rather than by zoning regulation. Howard High was attended by Negro and the others by white students. As is customary in today's high schools, curriculums are so arranged as to provide courses for those whose education will terminate at high school, as well as for those who will go on to college. In a report submited to the District Court, the education available at Howard High School (Negro) was described as follows:

> "When the new building for the Howard School was being planned, educators and citizens alike were recognizing that many advantages accrued to housing in the same plant facilities for all educational programs at the secondary level. Hence, Howard High School, as the senior division of a 1-12 program, is the only truly comprehensive school in the Chattanooga system. It provides general education, college preparation and vocational education, with a much broader selection of course offerings than either Chattanooga

> High or Kirkman Technical High School. It represents the type of school which many authorities recommend for all adolescents."

Notwithstanding the foregoing, the evidence disclosed that there are certain vocational training courses at Kirkman Technical High School and at Chattanooga Technical Institute which could not be had at Howard High. The reverse is also true, namely, that some of the courses at Howard High are not available at the other high schools. Federal financial support is relied on fo providing vocational training courses. The Board explained that in determining which students would be given the varying vocational training, it was following the standards suggested by the Federal Administration of Vocational Education. A pertinent quote from a release by that agency is as follows:

> "Admission to any vocational class should be based upon evidence that the applicant can benefit by the instruction to be given in that class and that he possesses the qualifications required for the successful utilization of the training in that given type of work. Entrance to a vocational class should be based upon those factors, the desire of the applicant for the vocational training offered, his probable ability to benefit from the instruction to be given, and his chances of securing employment in the occupation after he has secured the training."

[5] Accordingly, what vocational courses were made available to Negro high school students was determined in part upon the likely opportunity of employment in that trade that a Negro boy or girl would have in the community. While we recognize the general soundness of such approach, today's effort is to widen the employment opportunities for Negroes by equipping them with skills and education that

will allow them to find employment in jobs heretofore generally unavailable to Negroes. A simple illustration of what the present Chattanooga plan may permit until complete desegregation is accomplished, was brought out on the argument of this case. If, during such waiting period, two young ladies, one white and the other Negro, desired to study to become dental technicians, the white girl could obtain the needed training, but the Negro girl could not. While the plaintiffs' complaint did not allege that the quality of the teaching or curriculums of the segregated Negro schools was inferior to that provided by the white schools, the point under discussion was urged and considered and relief from such inequality could be provided under the complaint's prayer for general relief. Even though the second Brown decision, *Brown v. Board of Education*, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, rendered permissible a time lag in the accomplishment of complete desegregation, it did not contemplate that such time would permit the maintenance of unequal facilities. Even the "separate, but equal" plan of racial separation approved by *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256, would not have permitted such imbalance in educational opportunities. Such inequalities were ordered to be eliminated by *Sweatt v. Painter*, 339 U.S. 629, 70 S.Ct. 848, 94 L.Ed. 1114; *Sipuel v. Board of Regents*, 332 U.S. 631, 68 S.Ct. 299, 92 L.Ed. 247; and *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 70 S.Ct. 851, 94 L.Ed. 1149. In *Florida* ex rel. *Hawkins v. Board of Control*, 350 U.S. 413, 76 S.Ct. 464, 100 L.Ed. 486, the Supreme Court held that the "all deliberate speed" rule of Brown did not apply to graduate schools where immediate entrance into such a school was essential to overcome inequality in opportunity for graduate study. In *Goss v. Board of Education of Knoxville*, 301 F.2d 164 (C.A. 6, 1962), supra (now revesed in part on other grounds, 373 U.S. 683,

83 S.Ct. 1405, 1 L.Ed.2d 632), a like question was involved. We there said:

> "Judge Taylor wisely withheld approval of the plan insofar as it denied Negro students the right to take the technical and vocational courses offered at Fulton High School. The board should, as he suggested, present within a reasonable time a plan that would permit all Negro students who desire and are qualified to have an opportunity to take the special courses of this high school." (301 F.2d at 168).

[6] We do not hold that the defendant Board of Education must, in all events, and forthwith, find ways of providing Negroes with every training course now obtainable in the so-called white high schools. The limitations of space, equipment, trained personnel and necessary funds may indeed disable the Board from accomplishing immediate erasure of such inequality. It must also be permitted to employ its informed judgment as to the aptitude, scholastic attainments and other qualifications of applicants, apart from race, in screening them. We issue no command or specific directives, but, under our remand, the District Judge should require the Board to make a study of the problem and within a reasonable time submit a plan that will permit Negro students to have the opportunity to take vocational training courses for which they are qualified.

In appeal No. 15039, the judgment of the District Court is affirmed. In appeal No. 15038, the cause is remanded to the District Court for further proceedings consistent with this opinion.